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Source: *Journal of Policy Analysis and Management*, Vol. 20, No. 3 (Summer, 2001), pp. 545-549

Published by: Wiley on behalf of Association for Public Policy Analysis and Management

Stable URL: <http://www.jstor.org/stable/3326136>

Accessed: 28-06-2016 19:50 UTC

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# Insights

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## **MORE GUN LAWS OR MORE GUN LAW ENFORCEMENT?**

**Anthony A. Braga**

### **INTRODUCTION**

During the Presidential election campaign of 2000, we heard considerable debate about gun control. Anti-control advocates enjoyed success in framing the issue in this way: Should the government enact new gun control laws or enforce existing gun laws more vigorously. The irony is that some of the laws these advocates claimed should be enforced more vigorously were designed to be unenforceable.

The National Rifle Association (NRA) argues that virtually every aspect of lawful firearms commerce is heavily regulated and that hefty federal penalties for criminals caught with firearms are already in place (NRA, 1996, p. 1):

In addition to federal gun laws imposed by the National Firearms Act (1934), the Gun Control Act (1968), and the Firearms Owners' Protection Act (1986) among others, most states and many localities have their own firearm restrictions in place. There are currently more than 20,000 firearms laws in the U.S., clearly more than enough to punish criminals who misuse firearms, but the laws have to be enforced.

The NRA-posed dichotomy between "more enforcement" and "more laws" has come to occupy a central place in the public policy debate on appropriate gun control measures. This dichotomy was routinely used in the rhetoric on gun control during the 2000 presidential campaign. Republican candidate George W. Bush argued: "I...believe strongly that we need to enforce the laws on the books.... [T]he best way to keep our society safe and secure is to hold people accountable for breaking the law" (*New York Times*, 2000, p. A26). During the election cycle, several large surveys measured public support for the contrasting positions. The Gallup Poll, Associated

Press Poll, ABC News/Washington, Fox News/Opinion Dynamics, and CNN/USA Today surveys consistently reported a majority of public support for “more gun law enforcement” over “passing new gun laws” ([www.pollingreport.com/guns.htm](http://www.pollingreport.com/guns.htm)).

## THE SHORTCOMINGS OF EXISTING FEDERAL FIREARMS LAWS

The implicit claim—that the number of laws tells us something about their quality or potential effectiveness—is wrong-headed. In fact, the number of firearms laws tells us nothing more about their value than does the number of players listed on a team’s roster. And when we look carefully at what some of these laws require, we see that they were intended to make them difficult to enforce. It is the responsibility of the Bureau of Alcohol, Tobacco, and Firearms (ATF), often working with state and local law enforcement, to investigate criminal firearms trafficking, arrest the perpetrators, and refer them to U.S. attorneys for prosecution. Unfortunately, ATF investigators are working with one hand tied behind their back because of the way the federal firearms laws are written.

For example, the United States Congress has consistently refused to close the most obvious loophole, namely the continued existence of an unregulated secondary firearms market. Transactions of new and second-hand firearms conducted through federally licensed dealers form the primary market for firearms, and transfers of second-hand firearms by unlicensed individuals form the secondary market (Cook, Molliconi, and Cole, 1995). A recent analysis of 1,530 ATF firearms-trafficking investigations revealed that traffickers operating in both markets illegally diverted new and second-hand firearms within states and across state lines (ATF, 2000a). These traffickers included straw purchasers,<sup>1</sup> unregulated private dealers, and corrupt licensed dealers (ATF, 2000a). The lack of background checks and transaction paperwork in the secondary market makes it easy for prohibited persons to acquire firearms and very difficult for law enforcement agencies to prevent, detect, and prosecute illicit buyers and sellers who operate in the secondary market. Secondary market transactions are legal but not subjected to any federal requirement to formally record such transactions on paper. Only 11 states have laws that require a record of secondary market transactions.<sup>2</sup> The main federal legal requirement is that the private seller may not knowingly transfer firearms to proscribed persons such as felons, fugitives, drug users, and illegal aliens. The provisions of the 1994 Brady Violence Prevention Act do not apply to secondary firearms market transactions; therefore, criminal background checks of the prospective buyer are not conducted during these private transactions.

## LEGISLATION THAT UNDERMINES THE ENFORCEMENT OF FEDERAL FIREARMS LAWS

Contrary to what the NRA argues, existing federal, state, and local legal frameworks do not provide law enforcement agencies with enough tools to keep guns out of the wrong hands. The NRA has actually impaired the ability of law enforcement to apprehend gun traffickers by sponsoring legislation that undermines the ability of

<sup>1</sup> A “straw” purchase occurs when the actual buyer of a firearm uses another person, the “straw purchaser,” to execute the paperwork necessary to purchase a firearm from a licensed dealer. The straw purchaser violates the Gun Control Act of 1968 by making a false statement with respect to information required to be kept in the licensed dealer’s records.

<sup>2</sup> These 11 states include California, Connecticut, Hawaii, Maryland, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, South Carolina, and West Virginia. Washington, DC and Puerto Rico also have such a system.

ATF agents to build cases against unregulated private sellers involved in firearms trafficking. Hailed by NRA spokesman Wayne R. LaPierre Jr. as a “major advancement” that addresses “the key problems law-abiding citizens have been having under the law” (Kurtz, 1986, p. A1), the NRA-sponsored 1986 McClure–Volkmer Firearm Owners’ Protection Act (FOPA) makes it very difficult to prosecute gun traffickers for dealing firearms without a license. Prior to the act, the operating rule was that individuals who sold five guns or more per year were considered firearms dealers and were required to obtain a federal firearms license. As a result of the FOPA, individuals who make occasional gun sales, buy guns as a hobby, or sell firearms from their private collections are exempted from acquiring a federal firearms license. The problem is that there is no defined limit to the number of guns sold or the profits made before an unlicensed seller is required to obtain a license. Gun traffickers exploit this gaping hole in licensing law to illegally divert guns to criminals and juveniles. Since the telltale paperwork is not available for these unregulated transactions, firearms traffickers operating in the secondary market can easily avoid prosecution by claiming that they were selling only a handful of firearms from their private collection. Although federal law includes heavy penalties for individuals who make false statements on firearms transfer paperwork, it is similarly difficult for ATF agents to prove that straw purchasers are falsifying paperwork by purchasing firearms for proscribed persons and not buying firearms for their personal collection and subsequently selling them on the unregulated secondary market.

An analysis of the disposition of 1530 ATF firearms-trafficking investigations suggests that prosecuting unlicensed dealers for engaging in the business of selling firearms and straw-purchasing presents a significant challenge in court. Although ATF agents reported that dealing without a license and falsifying paperwork were occurring in cases accepted for prosecution, the prosecutor was able to charge a defendant with these violations in less than 38 percent of the dealing-without-a-license cases and less than 45 percent of the straw-purchasing cases (ATF, 2000a).

Prosecuting scofflaw, licensed dealers, who are associated with high-volume gun trafficking, is often difficult for U.S. attorneys and ATF investigators. Corrupt licensed dealers illegally divert firearms through record-keeping violations such as making false entries and failing to keep the required transfer information. Although a corrupt licensed dealer may illegally divert hundreds of guns to the street, FOPA reduced most of these record-keeping violations from felonies to misdemeanors.<sup>3</sup> Courtesy of the NRA, the effective enforcement of gun laws against corrupt licensed dealers has been undermined by the small penalties associated with these offenses.

## PROBLEMS ENFORCING FEDERAL LAWS AGAINST GUN TRAFFICKERS

Gun traffickers are typically prosecuted on charges unrelated to trafficking because trafficking charges are difficult to prove and sometimes carry lesser penalties by comparison with other crimes such as “felon in possession” or drug trafficking (ATF, 2000a). One quarter of the firearms traffickers in the ATF analyses were charged with being a convicted felon in possession of a firearm, and another 6 percent were charged with other prohibited persons charges. More than 27 percent were charged with conspiracy charges and more than 12 percent were charged with narcotics violations.

<sup>3</sup> FOPA amended the Gun Control Act to a much higher standard for the prosecution to prove a licensee committed a felony by willfully failing to keep the required records. U.S. Code Title 18, Section 922(b)(5) makes it illegal for a licensed dealer to *willfully* dispose of a firearm without making entries in records; this violation carries a penalty of 5 years’ imprisonment. U.S. Code Title 18, Section 922(m) makes it illegal for a licensed dealer to *knowingly* make a false entry in, fail to make an entry in, or fail to properly maintain records the licensee is required to keep; this violation carries a penalty of 1 year’s imprisonment.

In a sense, this prosecution strategy of taking traffickers off the street by focusing on their associated criminal conduct is consistent with the NRA's assertion that existing tough sentencing laws provide opportunities to apprehend gun criminals. Unfortunately, most gun criminals do not have prior felony convictions (Greenfeld and Zawitz, 1995). Licensed dealers and individuals who purchase firearms from licensed dealers must pass criminal background checks to engage in firearm transfers. As such, scofflaw dealers and straw purchasers are typically not felons or drug abusers. Therefore, although prosecutors and ATF agents are creatively using the existing federal laws to make cases against gun traffickers, this type of prosecution strategy clearly has its limits.

The enforcement of laws against gun trafficking is also hindered by the rather cumbersome procedure ATF uses to trace firearms.<sup>4</sup> Most of the relevant firearms transactions records are not centralized, but kept piecemeal by the dealers, distributors, and manufacturers (ATF, 2000b). This arrangement reflects the intention of Congress to ensure that there be no national registry of firearms owners, while maintaining some mechanism that would allow crime investigators to trace a firearm. Although criminal background checks and paperwork are required for all transactions made through licensed dealers, second-hand firearms generally cannot be traced, as the records allowed by federal law do not link subsequent transactions after the first retail sale.<sup>5</sup> The limits of current record-keeping procedures thwart routine firearms tracing of second-hand firearms sold by licensed dealers and prevent ATF from identifying straw purchasers and scofflaw dealers who traffick second-hand firearms.<sup>6</sup> Trace data also provide ATF investigators with little support in examining the robust trade in second-hand firearms on the secondary market.<sup>7</sup> Modest changes in the current system could make a big difference (Travis and Smarrito, 1992). For example, a requirement for licensed dealers to report serial numbers for all sales to ATF would greatly facilitate the tracing process without creating a central registry of gun owners. A requirement that all secondary market transactions pass through federally licensed dealers—with the same screening and paperwork provisions as if the gun were being sold by the dealer—would be a much broader effort that could be used to good effect in detecting gun traffickers. The NRA would vigorously challenge both proposals as infringing on the rights of lawful gun owners and as violating the FOPA, which prohibits ATF from establishing any national system of gun registration.

No doubt we do need to enforce gun laws more vigorously, but that effort would be greatly facilitated if some of those laws were amended. “More laws” and “more enforcement” are complements, not substitutes. Both are needed to reduce the great social burden of gun violence.

<sup>4</sup> The Gun Control Act of 1968 established the regulations that make it possible, at least in principle, to determine the chain of commerce for a firearm from the point of import or manufacture to the first retail sale.

<sup>5</sup> In exceptional instances where a firearm is involved in a particularly important crime, ATF may launch an “end to end” trace in an attempt to document the chain of possession beginning with an interview of either the first or the most recent owner. Needless to say this type of trace is expensive and far from routine.

<sup>6</sup> Gun shops sell many second-hand guns and, in this regard, resemble automobile sales lots. Similar to the auto dealers who sell both new and used cars, gun dealers sell both new and used firearms. From the perspective of the gun trafficker, it makes good sense to purchase used firearms when at a licensed dealer. More firearms can be purchased for less money and suspicious purchasing patterns are less likely to be detected by ATF.

<sup>7</sup> Cook and Ludwig (1996) estimate that some 30–40 percent of all firearms transactions take place on the secondary market.

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